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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1117

HEATHER McFADYEN-SNIDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Sixth Circuit**

**REPLY TO BRIEF OF THE UNITED
STATES IN OPPOSITION**

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TABLE OF CONTENTS

	PAGE
Cases Cited:	
United States v. Dinitz, 424 U.S. 600 (1976)	3
United States v. Kessler, 530 F.2d 1246, 1256 (5th Cir. 1976)	3
Constitutional Provisions:	
Fifth Amendment to the Constitution of the United States (Double Jeopardy Clause)	3, 4

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The government attempts to characterize this case as one involving a routine reversal, for a relatively common error by the prosecutor which resulted in an unfair trial. In so doing the government chooses to ignore the specific findings, by the Court of Appeals, of the deliberate and prejudicial misconduct of the prosecutor; that the Court of Appeals, in reversing petitioner's conviction, stressed, among other things, that the prosecutor, despite the warnings given to him by the District Judge, "persisted in ignoring these warnings

and deliberately offered the incompetent evidence in rebuttal." (App. A to Petition for Certiorari, p. 8a) This was therefore not the case where the prosecutor inadvertently, in a burst of zealousness, introduced evidence which produced the result; on the contrary, this was a case where the prosecutor, despite the warning by a District Judge against "overkill", had nevertheless persisted in ignoring that warning and had deliberately prejudiced the jury against the petitioner.

In attempting to distinguish the *Kessler*, *Martin* and *Broderick* cases, the government observed that in this case "the prosecutor did not violate any prior understanding with the court or the defense * * *." (Brief in Opposition, p. 10) The record clearly discloses that the prosecutor did, in fact, violate the prior understanding—which was reached during a side-bar conference wherein the Trial Judge told the prosecutor that were he to introduce evidence of petitioner's sexual activities, it would be "overkill". The Court of Appeals, in reversing, apparently agreed that the prosecutor, by persisting in ignoring the warnings and by deliberately offering the evidence in rebuttal, had indeed violated this understanding.

The government also seeks, in effect, to relitigate the issues in the primary appeal by suggesting that the Court of Appeals was incorrect in reversing petitioner's earlier conviction. In so doing the government is attempting to do just what the prosecutor did in the district court—justify admission of the incompetent and prejudicial evidence, by urging the prosecutor was merely guilty of innocent error inherent in and motivated by a good faith desire to obtain a conviction. (Brief In Opposition, p. 10) We suggest that this issue has already been decided adversely to the government and should not be raised here.

As a matter of fact, the Court of Appeals, in its findings dealing with and describing the prosecutor's misconduct, used almost the exact language as was used by the court, in *United States v. Dinitz*, 424 U.S. 600 (1976) and *United States v. Kessler*, 530 F.2d 1246, 1256 (5th Cir. 1976), in holding such prosecutorial misconduct to be intentional and seriously prejudicial. Clearly, then, the Court of Appeals found and held that the prosecutor's misconduct was intentional, prejudicial and deliberate.

Since the government did not seek review of the earlier decision by the Court of Appeals, it has, in effect, thereby conceded, for the purpose of our argument, that the Court of Appeals was correct when it characterized the conduct of the trial prosecutor as deliberate misconduct, and should therefore be deemed to have waived any argument attacking the correctness of the earlier decision.

The Solicitor General argues that it is rare that a reversal for trial error warrants application of the Double Jeopardy Clause to bar retrial. We wish to point out that it is just as unusual and rare for a Court of Appeals, as in this case, to avoid ruling upon the issue involving the Trial Judge's misconduct by tactfully stating that "* * * * it is unlikely that the District Judge would want to try this case again." We suggest that this was a way of avoiding embarrassment to the Trial Judge while, at the same time, commenting on and indicating agreement with our contention that the Trial Judge also had deliberately acted in such a way as to deny petitioner a fair trial. Since there was already sufficient error to warrant reversal for new trial, the Court of Appeals apparently desired to avoid an embarrassing discussion and ruling upon the misconduct of the Trial Judge.

Thus, while it is literally true that the Court of Appeals did not reach the issue of the Trial Court's misconduct, its pointed observation, aforesaid, clearly indicated its disapproval of the Trial Court's conduct. The rarity of such observations in opinions of higher courts, speaks for itself.

We respectfully refer to the court's attention to these matters in response to the government's contention that this is merely a routine case involving an overzealous prosecutor. The case also involves an "overzealous" Trial Judge who, as the trial proceeded, became increasingly involved with the prosecution of the case in a manner which clearly indicated to the jury his partiality to the government's case. The combination of the prosecutor's misconduct and that of the Trial Judge, in injecting himself into the interrogation and trial, constituted such prosecutorial and judicial overkill as to have deprived petitioner of a fair trial and, therefore, warrants a bar to the retrial of petitioner under the Double Jeopardy Clause.

Respectfully submitted,

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